STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2008
v	No. 278800 Kent Circuit Court
ANTHONY LEVAR BANKS, Defendant-Appellant.	LC No. 06-008426-FH

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant, Anthony Levar Banks, appeals by right his conviction for first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 5 to 50 years' imprisonment for the first-degree home invasion conviction. We affirm, but remand for correction of the judgment to reflect that defendant was convicted by a jury not from a plea.

Defendant first asserts that there was insufficient evidence that he intended to commit an assault when he entered the victim's residence. We review the evidence de novo in the light most favorable to the prosecution to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

The information in this case alleged that defendant entered "without permission a dwelling . . . and, while entering, present in, or exiting did commit an assault . . . ." Thus, with respect to the circumstances present in this case, the prosecution had to prove that defendant (1) entered a dwelling without permission; (2) while entering, exiting, or being present in the dwelling, actually committed an assault; and (3) that another person was lawfully present in the dwelling at the time. MCL 750.110a(2); *People v Sands*, 261 Mich App 158, 162-163; 680 NW2d 500 (2004). Defendant does not dispute that he entered the house without permission, and that there were other people lawfully present in the dwelling at the time, including the victim, her husband and children. He also does not dispute that he committed an assault while in the dwelling.

Defendant instead argues that there was insufficient evidence that he had the specific intent to commit an assault because he was intoxicated. Defendant argues that he has no

recollection of what happened that night because of his intoxication, and that even if he was the person who entered the dwelling, he was confused and had no intent to commit an assault. But, pursuant to MCL 768.37(1), voluntary intoxication is not a valid defense:

> Except as provided in subsection (2), it is not a defense to any crime that the defendant was, at that time, under the influence of or impaired by a voluntarily and knowingly consumed alcoholic liquor, drug, including a controlled substance, other substance or compound, or combination of alcoholic liquor, drug, or other substance or compound.

The only exception is where defendant proves that "he or she voluntarily consumed a legally obtained and properly used medication or other substance and did not know and reasonably should not have known that he or she would become intoxicated or impaired." MCL 768.37(2).

The exception does not apply. The record is replete with evidence demonstrating that defendant knew of the intoxicating effect of alcohol and often drank to the point of blacking out and being unable to remember his actions the next day. In fact, defendant admitted that he was an alcoholic. There was also uncontroverted evidence based on defendant's testimony that, on the day of the incident, defendant began the day by drinking the remnants of a beer, and then drank tequila, and finally gin. Defendant testified that he remembered walking to a friend's house around the corner to fill his cup with more gin, and that he was drinking gin because he did not have money. Defendant also testified that he knew his tolerance level for alcohol had increased, and that he could consume approximately a fifth of alcohol at that time. Defendant testified that no one forced him to drink that day. Defendant never stated that he did not know that consuming alcohol would render him intoxicated. The fact that defendant admitted to his alcoholism and testified regarding what quantity of alcohol he could tolerate demonstrates that there is no way he consumed the alcohol that day and "did not know and reasonably should not have known that he or she would become intoxicated or impaired." MCL 768.37(2).

Moreover, as the information reflects, that part of the statute with which defendant was charged does not include having to prove defendant possessed the specific intent to commit an assault when defendant entered the residence.[1] Rather, the prosecution had to demonstrate that while defendant was in the dwelling, he actually committed an assault. *Sands*, *supra* at 162. The record evidence supports beyond a reasonable doubt that defendant committed an assault while in the house. Defendant entered the victim's dwelling, which was next to his own, at approximately 4:30 a.m.; he had to maneuver through a six-foot fence surrounding the house to do so. His own house did not have a fence and was a different color. He entered through an unlocked basement door at the back of the home, which was on the side away from his own house. Upon entering, he walked up five steps and turned left into the bedroom. The victim

[1] MCL 750.110a(2) provides in part: "[A] person who . . . enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits . . . [an] assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists: . . . (b) Another person is lawfully present in the dwelling.

testified that he shut the door after he entered her bedroom. Defendant forcefully shook her awake and stated, "Let's go. Come on. Let's do this, girl. We can do this." He also told her that his brother was upstairs with her children. The victim told defendant to leave and attempted to rise from her bed, but defendant pushed her down twice. The victim managed to escape and went upstairs to her husband, who escorted defendant out of the house. Viewing the evidence in the light most favorable to the prosecution and drawing all reasonable inferences and making credibility choices in support of the jury verdict, we conclude the elements of the crime were proved beyond a reasonable doubt. *Tombs*, *supra* at 459.

Defendant next argues that the verdict was against the great weight of the evidence. Defendant did not raise this claim in a motion for a new trial in the trial court; thus, this forfeited issue is reviewed for plain error that affected defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). Defendant cannot demonstrate plain error.

A verdict is against the great weight of the evidence where "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, *supra* at 218-219. In this case, the verdict was fully supported by the evidence. The prosecution had to prove that defendant entered the dwelling without permission, that defendant committed an assault while in the dwelling or while entering or exiting, and that another person was lawfully present in the dwelling at the time. *Sands*, *supra* at 162; MCL 750.110a(2). Based on the charge against defendant, the prosecution was not required to show that defendant possessed the intent to commit an assault when he entered the dwelling, just that he actually committed one when he was there. Defendant argues that the great weight of evidence did not support a finding of intent. Intent, however, was not the issue. He does not argue that the verdict is against the great weight of the evidence because the evidence demonstrated that defendant did not actually commit an assault when he was in the dwelling.

Defendant next argues that the trial court erred in failing to instruct the jury on second- and third-degree home invasion. This issue is not preserved, *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004), and we review for plain error, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Initially, we note that a trial court is not required to instruct the jury sua sponte on a lesser-included offense. *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). Such instruction "is appropriate only if the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *People v Mendoza*, 468 Mich 527, 533, 545; 664 NW2d 685 (2003), citing *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). A trial court may not instruct the jury on a cognate lesser offense.[2] *Cornell*, *supra* at 354. Second-degree home invasion is a necessarily-included offense of first-degree home invasion, which contains an additional factual element, specifically the lawful presence of a person in the dwelling. But, that fact was not in dispute and a rational view of the evidence

[2] "Cognate" offenses "are only 'related' or of the same 'class or category' as the greater offense and may contain some elements not found in the greater offense." *Cornell*, *supra* at 355.

would not have supported the lesser instruction. *Mendoza*, *supra* at 545; *Cornell, supra* at 357. Defendant was not entitled to a second-degree home invasion instruction, and third-degree home invasion is not a necessarily included lesser offense of first-degree home invasion where it contains elements not found in the greater crime. *Mendoza*, *supra* at 533. Thus, defendant was not entitled to an instruction on that crime. *Id.*

Defendant also alleges several instances of prosecutorial or police misconduct. Defendant asserts that the prosecution improperly argued in closing that defendant intended to sexually assault the victim and mistakenly argued that defendant placed both of his hands on the victim, even though defendant was holding a drink in one hand. Because defendant did not object to these statements at trial, the challenged arguments are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In addition, if a curative instruction would have cured any prejudicial effect of an improper statement, this Court is precluded from finding error requiring reversal. *Id.* at 329-330. The prosecution's statements must be viewed in context of defendant's arguments and the circumstances of the case. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutorial misconduct is present where the defendant was denied a fair and impartial trial. *Id*. at 453.

"A prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). The prosecution never stated or implied that defendant sexually assaulted the victim. Rather, the evidence supported the prosecution's statements, which mirrored the testimony of the victim. The prosecution is "generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case" and need not "state inferences and conclusions in the blandest possible terms." *People v Unger*, 278 Mich App 210, 236, 239; 749 NW2d 272 (2008).

We also find that the prosecution's misstatement that defendant "started putting his *hands*[3] on her," in light of the prosecution's argument as a whole and several previous statements that were more accurate, constituted merely one brief reference, whose inaccuracy, if any, was minor and of no consequence to whether defendant committed the assault, which was the disputed element at trial. Defendant fails to show that a plain error occurred that affected the outcome of the proceedings; further, if defendant had objected to the minor misstatement, the trial court could have given a curative instruction that would have cured any defect. *Callon, supra* at 329.

Defendant also alleges that the police induced the victim to change her story. The responding officer's initial report indicated that the victim was asleep on the couch. When the victim went to the police station later that day and reviewed the report with a detective, she corrected the report to state that she was asleep on her bed in her bedroom. Police or prosecution

[3] The evidence did not support that defendant used both hands.

attempts to intimidate witnesses from testifying, if successful, would deny a defendant's constitutional right to due process of law. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Nevertheless, we find that there is no evidence of police coercion in the record. The victim testified that she was asleep in her bed, her son was asleep on the couch, and that defendant closed the bedroom door. Her husband testified that the victim was asleep in her bed when he went upstairs to bed that night before the incident occurred, and the responding officer testified that he briefly interviewed the victim and jotted a few notes down, but was more concerned with apprehending the suspect at that time and did not review his notes with her. The detective testified that the victim corrected the report herself, without prompting. Thus, defendant has failed to demonstrate the existence of any misconduct, much less plain error. *Callon*, *supra* at 329.

Defendant next asserts that he was deprived of the effective assistance of counsel because defense counsel coerced him into waiving his preliminary examination, failed to request that the trial court instruct the jury on second- and third-degree home invasion, and failed to object when the prosecution argued that he intended to sexually assault the victim. Because defendant did not move for an evidentiary hearing or a new trial in the trial court with respect to this claim, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). Defendant must demonstrate that defense counsel's performance was so seriously deficient that defendant was deprived of a fair trial, a trial whose result is reliable. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). Defendant must overcome the presumption that defense counsel's actions constituted trial strategy, and bears the "burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *Id.* at 6.

Here, there is no evidence of record that defense counsel coerced defendant into waiving his preliminary examination. Defendant is not entitled to relief because he has failed to establish the factual predicate for his claim where he offers no proof or additional argument to support it.

Additionally, defense counsel was not ineffective for failing to request an instruction on second- and third-degree home invasion because instructions on those lesser crimes were not warranted. *Mendoza*, *supra* at 533. Defense counsel cannot be found ineffective for failing to raise a meritless argument or futile objection. *Snider*, *supra* at 425. For the same reason, defendant is not entitled to relief on his claim that the prosecutor improperly argued that defendant intended to sexually assault the victim. Where such an argument was not made, objection would have been futile. *Id.*

Lastly, defendant argues that he was charged under defective laws because first-degree, second-degree, and third-degree home invasion are essentially the same offense. We disagree with this unpreserved legal challenge. As stated, first- and second-degree home invasion are not the same offenses. The crime of second-degree home invasion does not require that the defendant possess a weapon or, in the alternative, that another person was lawfully present. Second-degree home invasion requires committing an assault against either a person who was not lawfully present, or outside the residence when defendant was entering or exiting. The two crimes are not the same, but second-degree home invasion is a necessarily lesser-included offense of first-degree home invasion. *Mendoza*, *supra* at 533. Similarly, third-degree home invasion is not the same offense as first-degree home invasion because it involves the commission or intent to commit a misdemeanor, larceny, or assault, or it alternatively requires

that the defendant violate a condition of his parole, probation, or bail. MCL 750.110a(4). Thus, it is a cognate lesser offense. *Cornell, supra* at 355.

We affirm but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly